

2014-083

STATE OF ALABAMA OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE ATTORNEY GENERAL

August 21, 2014

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Honorable Grady James, Chairman The Utilities Board of the Town of Pennington Post Office Box 309 Pennington, Alabama 36916

> Municipalities - Utility Boards - Business Licenses - Gross Receipts - Public Corporations - Choctaw County

> The Town of Pennington ("Town") may require the Utilities Board of the Town of Pennington ("Utilities Board" or "Board"), which is incorporated under section 11-50-230, et seq., of the Code of Alabama, to purchase a business license.

The Utilities Board is required to purchase a business license for the years prior to and including the current tax year. Unless the Town of Pennington can identify another ordinance that contains the penalty provision for an entity's failure to pay its business license tax, the Utility Board is not required to pay penalties for violating the business license ordinance.

A business license for the Utilities Board for the Town of Pennington may not exceed three percent of the gross receipts of that utility for the preceding year.

The Utilities Board of the Town of Pennington is a separate entity from the Town.

The Utilities Board may not amend its articles of incorporation to authorize the Board itself to make its own appointments.

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Dear Mr. James:

This opinion of the Attorney General is issued in response to your request on behalf of the Utilities Board of the Town of Pennington.

QUESTION

(1) Can the Town of Pennington require the Utilities Board of the Town of Pennington, which is incorporated under section 11-50-230, et seq., of the Code of Alabama to purchase a business license?

FACTS AND ANALYSIS

The Utilities Board of the Town of Pennington is incorporated pursuant to section 11-50-230 through 11-50-241 of the Code of Alabama. ALA. CODE § 11-50-230 to 11-50-273 (2008). Section 11-50-260 of the Code authorizes any waterworks board established pursuant to section 11-50-240 of the Code to also establish, maintain, and operate a gas board. ALA. CODE § 11-50-260 (2008). The Utilities Board of the Town of Pennington operates a water works system, a sanitary sewer system, and a gas system. Recently, the Board has received notice that the Board is not in compliance with the business license ordinance of the Town of Pennington. The several questions posed by the Board revolve around the Board's obligation or responsibility to adhere to this business license ordinance.

Initially, you question whether the Town of Pennington may require the Utilities Board to purchase a business license. Section 11-51-90 authorizes a municipality to impose a license tax on a utility corporation. ALA. CODE § 11-51-90 (2008). In your letter of request, you make reference to section 11-50-235(c), which provides certain tax exemptions to waterworks boards formed pursuant to section 11-50-230 of the Code. ALA. CODE § 11-50-235 (2008). Specifically, this section states that "[t]he property and income of such corporation shall be exempt from all taxation in the State of Alabama." ALA. CODE § 11-50-235 (2008). The phrase "all taxation in the State of Alabama," and the meaning to be assigned thereto, forms the basis for your specific inquiry.

Previously, this Office determined that the provisions of section 11-51-90 were applicable to utility boards and water boards established pursuant to section 11-50-310 of the Code. See the following opinions:

• Honorable E. Lee McCarty, III, Mayor of Wilsonville, dated October 9, 2013, A.G. No. 2014-008;

- Honorable John C. McKelvey, Attorney, Water and Sewer Board of the Town of Leighton, dated October 12, 2004, A.G. No. 2005-001;
- Honorable Barry D. Vaughn, Attorney, Town of Oak Grove, dated April 4, 2002, A.G. No. 2002-200;
- Honorable Guy F. Gunter, III, Attorney for the Water Works Board of the City of Opelika, dated June 4, 1997, A.G. No. 97-00197;
- Honorable William R. Justice, Attorney, City of Alabaster, dated May 10, 1996, A.G. No. 96-00209.

Moreover, in an opinion to Barry L. Mullins, this Office determined that the provisions of section 11-51-90 were also applicable to water and utility boards established pursuant to section 11-50-230 of the Code. See opinion to Honorable Barry L. Mullins, Attorney, Waterworks Board of the City of Fayette, dated March 10, 2004, A.G. No. 2004-091.

In City of Pinson v. Utilities Bd. of the City of Oneonta, 986 So. 2d 367 (Ala. 2007), the Supreme Court of Alabama determined that municipalities have the power to impose a license tax pursuant to section 11-51-90 of the Code for the privilege of doing business within the municipal limits. The Court determined that the exemption expressed in section 11-50-322 of the Code exempts the utilities board in that matter from all gross receipts taxes levied by the municipality with respect to the purchase, sale, use, and consumption of property. As such, Pinson made it clear that a municipal corporation may be subject to license taxes imposed on the privilege of doing business in a municipality.

In like fashion, the exemption found in section 11-50-235(c) of the Code exempts a utility board from the levy of taxes on property owned by that utility board. The exemption does not, however, specifically exempt any utility system authorized pursuant to section 11-50-230, et seq., of the Code from the imposition of a license tax. Accordingly, the Utilities Board is required to purchase a business license.

CONCLUSION

The Town of Pennington may require the Utilities Board of the Town of Pennington, which is incorporated under section 11-50-230, et seq., of the Code, to purchase a business license.

QUESTION

(2) If the Utilities Board is required to purchase a business license, then is the Utilities Board required to pay for business licenses and penalties for years prior to 2014 if it is not specified in the Town's ordinance?

FACTS AND ANALYSIS

In your letter of request, you informed this Office that the Town of Pennington has exercised its authority to impose license taxes on businesses within the Town. Yet you state that the ordinance does not expressly mention penalties in the instance an organization fails to comply with the ordinance.

The absence of a penalty provision within the business license ordinance is not sufficient to render the ordinance of no effect. See, generally, Winter v. City Council of Montgomery, 79 Ala. 481 (1885) (stating that the levy and assessment of taxes creates a liability on the taxpayer to pay). The Utilities Board has had an obligation to pay the license tax set out by the Town of Pennington since the passage of a properly adopted ordinance regarding the same. Although the Board may not be convicted for a violation of the ordinance unless some other ordinance containing a penalty provision could be identified, the Board could still be sued for the amount of the license tax due. Bivins v. City of Montgomery, 13 Ala. App. 641, 69 So. 224 (Ct. App. 1915).

Section 11-51-191(c)(2)a of the Code authorizes a preliminary assessment to be entered at any time a business fails to file a license form. According to the provisions of this statute, when no assessment has ever been entered, one might interpret the statute as prohibiting a tolling of any applicable statute of limitations. See, generally, Town of Westover v. Bynum, 103 So. 3d 827, 831 (Ala. Civ. App. 2012) (stating that the doctrine of laches may not be used against a municipality for failing to act in a more timely manner to collect business license fees due under a municipal ordinance).

CONCLUSION

The Utilities Board is required to purchase a business license for the years prior to and including the current tax year. Unless the Town of Pennington can identify another ordinance that contains the penalty provision for an entity's failure to pay its business license tax, the Utility Board is not required to pay penalties for violating the business license ordinance.

QUESTION

(3) If the Utilities Board is required to purchase a business license, what is the maximum amount that the Town of Pennington can require?

FACTS AND ANALYSIS

Section 11-51-129 of the Code authorizes a municipality to annually assess and collect an amount not to exceed three percent of the gross receipts of the business done by certain utility companies in the municipality during the preceding year. The statute authorizes the assessment to be levied on, but not limited to, the following: power companies, gas companies, waterworks companies, and gas-distributing companies. The fee schedule developed by the Town of Pennington, however, only seeks to assess and collect an amount equal to three percent of the gross receipts of the business transacted with respect to the sale or distribution of electrical current or natural gas. This Office notes that, for reasons previously expressed, the Town is also authorized to assess the water system of the Utility Board.

CONCLUSION

A business license for the Utilities Board for the Town of Pennington may not exceed three percent of the gross receipts of that utility for the preceding year.

QUESTIONS

- (4) If the Utilities Board is required to purchase a business license, does this mean that the Utilities Board is a separate entity from the town?
- (5) If the Utilities Board is a separate entity from the town, can the Utilities Board pass a resolution to remove, from the articles of incorporation, the authority of the Town of Pennington to make appointments to the Utilities Board?

FACTS AND ANALYSIS

The Utilities Board is a public corporation that is a separate entity from the Town of Pennington. ALA. CODE § 11-50-231 (2008). The Board is subject

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to the applicable provisions of its authorizing statutory authority and may not take action inconsistent with such authority. Section 11-50-234 of the Code sets out the manner in which members of the Board are to be appointed. The Town of Pennington is the only entity with the authority to make appointments to the Utilities Board. Thus, the Utilities Board lacks the authority to amend its articles of incorporation in the manner set out in your inquiry.

CONCLUSION

The Utilities Board of the Town of Pennington is a separate entity from the Town.

The Utilities Board may not amend its articles of incorporation to authorize the Board itself to make its own appointments.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE Attorney General

By:

BRENDA F. SMITH Chief, Opinions Division

Brenda J. Smith

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